

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota, by Irene
Gomez-Bethke, Commissioner,
Department of Human Rights,

Complainant,

V.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

Elliott Packing Co.,

Respondent.

The above-entitled matter came on for hearing before Jon L. Lunde, duly appointed Hearing Examiner, commencing at 9:00 a.m., on Tuesday, December 13, 1983, at the St. Louis County Courthouse, Fourth Floor Jury lounge, in Duluth, Minnesota, pursuant to a Notice and Order for Hearing dated June 28, 1983.

Ms. Elizabeth V. Cutter, Special Assistant Attorney General, 1100 Bremer Tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Complainant. Mr. David J. Koskinen, Van Evera, Koskinen, Clure, Andrew & Signorelli, Attorneys at law, Suite 700 Torrey Building, Duluth, Minnesota 55802, appeared on behalf of the Respondent. The record closed on December 21, 1983, upon the receipt of a late-filed exhibit authorized by the Hearing Examiner and agreed to by the parties.

NOTICE

Pursuant to Minn. Stat. 363.071, subd. 2 (1982), as amended by Minn. Laws 1983, Ch. 301, 201, this Order is the final decision in this case and under Minn. Stat. sec. 363.072 (1982), as amended by Minn. Laws 1983, Ch. 247,

144-145, the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. SS 14.63 through 14.69 (1982), as amended by Minn. Laws 1983, Ch. 247, SS 9-14.

STATEMENT OF ISSUES

The issues in this case are whether the Respondent discriminated against its employee on the basis of a disability by refusing to permit him to return

to work after an injury; and if so, the damages and other relief, if any, that should be awarded.

Based upon all the files records and proceedings herein, the Hearing Examiner makes the following:

FINDINGS OF FACT

1- The Respondent is engaged in the meat-packing business in Duluth, Minnesota. The Charging Party, Kenneth Main, is employed by the Respondent as a truck driver. Except for one lay off and absences following two job-related injuries, Plain has been continuously employed by the Respondent since the summer of 1952. At all times relevant to this case, Main was a member of the Teamsters' Union, Local 346 and covered by a collective bargaining agreement between that Union and the Respondent.

2. (Xi February 3, 1976, while carrying a 150-pound beef quarter on his shoulders, Main slipped and injured his back. He was absent from work for approximately one week after the injury. Later in the fall of 1976, Main began experiencing pain and numbness in his right hand. Eventually on September 22, 1976, Main consulted with Frank VI. Budd, M.D., an orthopedic surgeon in Duluth. Budd attributed the pain and numbness in Main's right hand to an arthritic condition in his neck which Budd believed was aggravated by the lifting requirements of Main's job. At that time, Budd instructed Main to find lighter work with no heavy lifting and Budd referred him for traction treatments.

3. Since Main's job duties involved the lifting of beef quarters weighing 150 pounds or more, and packaged meats weighing up to 100 pounds, he discontinued working for the Respondent on September 23, 1976, as Dr. Budd recommended. Shortly after that, he filed a claim for workers' compensation benefits. He received workers' compensation benefits from September 23, 1976, through February 19, 1979, when he returned to work.

4. On September 12, and again on November 21, 1977, hearings were held on Main's workers' compensation claim before Compensation Judge Lawrence C. Boyes. On February 1, 1978, Judge Boyes issued his Findings and Determination

relative to that claim. he found that as a result of Main's personal injury on February 3, 1976, he had sustained a 5 percent permanent partial disability of the back, and he determined that Main was temporarily totally disabled from the time of the injury to the time of the last hearing date. Judge Boyes also

determined that Main was not able to pursue his former employment. with the Respondent and that he was entitled to retraining benefits.

5. Main was in a retraining course certified by the Division of Vocational Rehabilitation between May- 17, 1977 and April, 1978. The course involved employment with the Duluth Air Base where Main was learning to become a meatcutter.

6. In May, 1978, after Main discontinued his retraining course, he went to the workers' compensation offices in Duluth to examine his compensation file. He wanted to find out why his disability rating was only 5 percent, if he was unable to work. the Respondent had previously filed a Notice of Registration of Physical Impairment indicating main had a 20 percent permanent partial disability. That filing had been accepted,

7. Main's workers' compensation file contained a letter from W. S. Pollard, M.D., who had examined Main in July and September, 1977, at the request of the Respondent's workers' compenstion insurer. In his letter dated December 6, 1977, Pollard concluded that Main had only a 5 percent impairment of spinal function and that he could work subject to that disability.

8. Late in May, 1978, when Main acquired a copy of Pollard's letter, he met with the Respondent's plant superintendent, Lawrence LaFlamme. Main told LaFlamme that he wanted his old job back and showed LaFlamme a copy of Pollard's letter. LaFlamme told Main that he needed a more recent evaluation by a company doctor before Main could return to work. At that time, Main said that he was told Pollard's letter was all that he needed to return to work and he told LaFlamme that he did not want to see Dr. Kohn, the company's physician. LaFlamme understood Main to mean that he was entitled to reinstatement based solely on Pollard's letter and that he would not submit to an examination by a company doctor. LaFlamme denied reinstatement on those grounds.

9. Several days later, on or about May 26, 1978, Dudley Smith, the Respondent's Board Chairman, met with Main to discuss his reemployment demand. At that time, Smith told Maain that another examination would be

required before he could return to work. Smith expressed his doubts about the reliability of Pollard's conclusions because they had been disputed by Budd and were not current. Main adamantly stuck to his position that he did not need another examination. A short time later Main gave Smith copies of Budd's

and Pollard's December, 1977, depositions, which had been taken in the course of his workers' compensation hearing.

10. On July 19, 1978, Smith met with Main and the Union's Business Agent and Shop Steward to discuss Main's reemployment. At that time, Smith reiterated his position that a current physical examination would be required before Main could return to work. At that time, Smith offered to schedule a physical examination. However, Main said he didn't have to take another examination and none was scheduled.

11. In August, 1978, Main filed a Union grievance to obtain reemployment, citing Pollard's deposition as authority for his ability to work. He also contacted the Minnesota Department of Human Rights regarding the situation. On August 28, 1978, he filed a formal charge with the Department alleging that the Respondent had discriminated against him on the basis of a disability by refusing to rehire him after the July meeting.

12. (On November 7, 1978, a fact-finding conference was held to discuss Main's charge against the Respondent. Main and Smith were present at that meeting as well as Edward Pelerin, a Department of Human Rights representative, and Pelerin's recording secretary. During that meeting, Pelerin proposed that Main take the examination requested by the Respondent on the condition that the Respondent agree to pay him backpay if the examining physician found that he was able to return to work. Smith did not agree to schedule an examination on those terms. Pelerin insisted that Main was not required to take an examination without a backpay stipulation if he didn't want to do so.

13. On November 8, 1978, Smith scheduled an appointment for Main with Dr. William Himango, an orthopedic surgeon, to take place on November 29, 1978. Smith then notified Main of the scheduled examination date and Main reluctantly agreed to go. After talking to Main, Smith notified Pelerin. Pelerin restated his position that Main was not required to take an examination if he didn't want to do so. Later the same day, Main called Smith

and advised him that he would not submit to an examination to, Dr. Himango.

Consequently, Smith cancelled the appointment.

14. At the suggestion of counsel for the Teamsers' Union, Main was examined by his personal physician, Dr. Budd, in January, 1979. This was done in preparation for the arbitration hearing on his grievance. Dr. Budd signed

a written release for Main's return to work as of January 16, 1979. Sometime after January 16, Budd's letter was submitted to Smith. Smith still insisted on an examination by a company doctor. Main finally agreed to such an examination. February 13, 1979, Main was examined by Dr. Himango who determined that he was able to return to work. Based on Himango's findings, the Respondent returned Main to work on February 19, 1979. He has been continuously employed with the Respondent since that time and has not missed any work resulting from his disability.

15. Under the terms of the collective bargaining agreement in effect between the Teamsters' Union and the Respondent in 1977, the Respondent had a contractual right to require a physical examination by its physician. article 16 A. of that agreement provides as follows:

PHYSICAL EXAMINATION: A- Physical, mental or other examinations required by a government body or the Employer shall be promptly complied with by all employees, provided, however, the Employer shall pay for all such examinations. Examinations are to be taken at the employee's home terminal and are not to exceed one (1) in any one (1) year, unless the employee has suffered serious injury or illness during the year. Employees will be required to take examinations during their working hours and receive compensation for all hours spent during such examination.

The company reserves the right to select its curi medical examiner or physician, and the Union may, if it believes an injustice has been done and employee, have said employee re-examined at the Union's expense.

16. The Respondent's policy has always been to require a doctor's release

before any employee absent more than three consecutive days for illness or

injury will be permitted to return to work.

17. The Complainant. issued its Complaint in this matter on June 28,

1983. The Respondent filed a timely answer on September 19, 1983.

Based upon the foregoing Findings of Fact, the Hearing Examiner makes the

following:

CONCLUSIONS

1. That the Hearing Examiner has subject matter jurisdiction herein under

Minn. Stat. 363.071 and 14.50 (1982).

2. That the Respondent received a timely and proper notice of the hearing

and that the Complainant has complied with all relevant, substantive and

procedural requirements of law and rule.

3 . That the Respondent is an Employer for purposes of Minn. Stat.

363.01, subd. 15 (1978)

4. That the Complainant established a prima facie showing that the Respondent discriminated against the Charging Party because of his disability by refusing to rehire him in May, 1978.

5. That the Respondent articulated legitimate non-discriminatory reasons for refusing to rehire the Charging Party in May, 1978.

6. That the Complainant failed to rebut the non-discriminatory reasons articulated by the Respondent for refusing to rehire the Charging Party until February 19, 1979, or show that they were a pretext for discrimination, and failed to establish, by a preponderance of the evidence, that the Respondent discriminated against the Charging Party on the basis of disability in refusing to rehire him prior to February 19, 1979.

7. That the Charging Party is not entitled to relief under the provisions of Minn. Stat. 363.071 (1978).

8. That the Respondent's request for its attorney's fees and other costs and disbursements in this matter is not authorized and must be denied.

9. That the Respondent had a contractual right to insist on a current medical examination before the Charging Party was rehired and such an examination was authorized by Minn. Stat. sec. 363.02, subd. 1(7)(i)(1978).

Based upon the foregoing Conclusions, the Hearing Examiner makes the following:

ORDER

IT IS HEREBY ORDERED: That the Complainant's Complaint be and is hereby DISMISSED.

Dated this 9th day of January, 1984.

JON L. LUNDE
Hearing Examiner

MEMORANDUM

The Respondent is charged with the discriminatory refusal to rehire the Charging Party due to his disability contrary to the provisions of Minn. Stat.

363.03, subd. 1(2)(a) (1978). The statute provides, in part, as follows:

Except when based on a bona fide occupational qualification, it is an unfair employment practice:

(2) For an employer, because of disability

(a) to refuse to hire or maintain a system of employment which unreasonably excludes the person seeking employment

Cases of discrimination in an employer's refusal to hire, promote or rehire employees generally involve three stages of pleading and proof. First, the Complainant must establish a prima facie case of discrimination. Tie Respondent must then rebut that prima facie case by articulating some legitimate nondiscriminatory reason for the employment action taken. Tie Complainant may then show that the proffered reasons for the employment action are a mere pretext for illegal discrimination. Hubbard v. United Press Intern., Inc., 330 N.W.2d 428, 441 n.12 (Minn. 1983). Ube elements of a

'Prima facie showing of illegal discrimination normally follow the principles enunciated by the United States Supreme Court in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). The McDonnell-Douglas formula for establishing a prima facie case contains the following elements: (1) that the charging party belongs to a protected class; (2) that he applied for and was qualified for a job for which the employer was seeking applicants; (3) that despite his qualifications, he was rejected for employment; and (4) that after rejection the position remained open and the employer continued to seek applicants from persons with his qualifications. However, application of the McDonnell-Douglas formula was not intended to be rigid, mechanized or ritualistic. When the facts of a particular case do not fit into the standard formula, adjustments must be made. It is only necessary that the prima facie elements are sufficient to support an inference that unless explained, it is more likely than not that the action complained of was based on illegal criteria. Fernco Construction Corp. v. Waters, 438 U.S. 567, 17 F.E.P. 1062

(1978). The usual elements for a prima facie showing of discrimination do not fit the facts of this case. Under the terms of the collective bargaining agreement, Main was entitled to reinstatement if able to perform his prior job duties. Therefore, it is immaterial whether the position remained open or the employer sought, or actually hired, a different individual with similar qualifications.

For purposes of this case, it is concluded that the following factors establish a prima facie showing of discrimination: (1) that the Charging Party is a disabled person; (2) that he was entitled to reemployment, if able to work; (3) that he was able to work when he first requested reinstatement; (4) that in spite of his ability to work, he was denied reemployment for almost nine months. All these elements were established in this case and raise a clear inference of discrimination unless explained by the employer.

The Respondent articulated persuasive and legitimate non-discriminatory reasons for its failure to rehire the Charging Party prior to February 19, 1979. LaFlamme testified that he refused main reemployment solely on the basis of Dr. Pollard's letter because it was not current and because the Respondent had a right to request its own physical examination under the collective bargaining agreement. LaFlamme did not understand that main was willing to be examined by a company physician to get a current medical evaluation.

Several days after Main met with LaFlamme, he also met with Smith. Smith testified that Pollard's conclusions were unacceptable because they were inconsistent with the Compensation Judge's ultimate findings, different from Budd's testimony in the workers' compensation proceeding and not sufficiently current. In July, after again explaining his unwillingness to accept Pollard's letter, Smith offered to set up another examination for Main, but did not do so because Main indicated he would not take one. Main continued to resist the current examination until January, 1979, when he obtained a more current evaluation from Dr. Budd as the Union's attorney requested. Smith still felt that this release, while current, was insufficient in view of the medical dispute which existed over the extent of Main's disability. Smith felt that an examination by a company doctor, who was not involved in the prior workers' compensation proceeding, should be required. as soon as Main agreed to an examination by a company physician, it was scheduled. Then that

physician reported that Main was able to return to work, he was immediately reinstated.

Under the terms of the collective bargaining agreement in effect at the time of Main's application for reemployment, the employer had a right to insist on a physical examination of the Charging Party by its own doctor. This contractual provision is authorized by Minn. Stat. 363.02, subd. 1(7) which provided that it is not an unfair employment practice for an employer to

require a person to undergo a physical examination for the purpose of determining the person's capability to perform available employment.

The Complainant attempted to rebut the Respondent's stated reasons for refusing to reemploy him prior to February 19, 1978, through the Charging Party's testimony that he was willing take a physical examination at the time he first approached LaFlamme in May, 1978. That testimony was not persuasive. Both LaFlamme and Smith were led to believe, and did, in fact, believe that Main was demanding reemployment in the spring of 1978, based solely on Pollard's letter and both understood that Main would not take any further examinations. The Complainant argues that it is unreasonable to think that Main would refuse such an examination when all he wanted was his job. However, Smith's testimony to the contrary was more consistent and more persuasive. Smith had a better recollection of the events which occurred and was more certain of them. Moreover, the Charging Party admitted that he refused to agree to an examination when that matter was discussed at the conciliation conference in November of 1978. His desire for reemployment is not consistent with his admitted reluctance to agree to the examination Smith proposed at that time.

Moreover, when Main first applied for reemployment, he knew that he was required to submit a current medical release consistent with the Respondent's long-standing policy. However, he presented no current release to work at that time and did not even attempt to obtain one until January, 1979. His application in May was clearly incomplete. Then he finally did submit a current evaluation from Dr. Budd, the Respondent still had the statutory and contractual right to insist on an independent examination by its own physician. When Main consented to such an examination and passed it, he was immediately reinstated. Under these circumstances, the Hearing examiner is persuaded that the Respondent's officers, LaFlamme and Smith, were not motivated to, any discriminatory reason when they refused to reinstate Main.

until he had a current medical evaluation from a company-appointed physician.

On the contrary, they merely wanted to make sure that Main was capable of performing the duties of his position without reinjury.

The employer's hesitation to reinstate him without an examination was certainly reasonable and supports the lack of any discriminatory motive.

After all, the Compensation Judge had concluded, based on conflicting medical

evidence, including Pollard's opinions, that Main was unable to perform the duties of his position as a truck driver and was entitled to retraining benefits. Given that finding and award, it was reasonable to refuse to reemploy main based on Pollard's letter, and to insist on a current evaluation by a company doctor. The record in this case falls far short of establishing persuasive evidence of any discriminatory intent and the complaint must be dismissed.

The Respondent has requested that it be awarded attorney's fees and other costs and disbursements in this matter. However, an award of such items against the State is not specifically authorized by statute and must be denied. See, e.g., *Dworsky v. Vermes Credit Jewelry, Inc.*, 244 Minn. 62, 69 N.W.2d 118, 124 (1955); *Department of Employment Security v. Minnesota Drug Products, Inc.*, 258 Minn. 133, 104 N.W.2d 640, 645 (1960).

J. L. L.